

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY LEE KING,

Defendant-Appellant.

UNPUBLISHED

October 15, 2009

No. 285490

Genesee Circuit Court

LC No. 08-022025-FC

Before: K. F. Kelly, P.J., and Jansen and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, carrying a concealed weapon (CCW), MCL 750.227(2), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 39 to 60 years for the second-degree murder conviction, 2 to 7-1/2 years for the CCW conviction, and 3 to 7-1/2 years for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from the shooting death of Gene Marsh during the early morning hours of August 22, 2007, near the intersection of Cecil and Jewell Drives in Flint, an area known for drug sales.

I. Alibi Defense

Defendant first argues that defense counsel was ineffective for failing to file an alibi notice and failing to include two witnesses on his witness list, which defendant maintains precluded him from presenting an alibi defense. He also argues that the trial court erred in failing to instruct the jury on an alibi defense, and that defense counsel was ineffective for failing to request such an instruction.

A. Standards of Review

Defendant did not raise his ineffective assistance of counsel claims in an appropriate motion in the trial court. Therefore, our review of those claims is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant

also did not request an alibi instruction at trial, or object to the trial court's failure to instruct on this defense. Therefore, this issue is not preserved and defendant has the burden of demonstrating a plain error affecting his substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Defendant must overcome the strong presumption that his attorney exercised sound trial strategy. *Id.* Also, we will not assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one that might have made a difference in the trial's outcome. *Id.*

B. Analysis

The record does not support defendant's argument that Monica McBride was an alibi witness. Her proposed testimony did not indicate that defendant was with her when the victim was shot.¹ By her latest estimation, defendant left her aunt's house at 2:20 a.m. The police were dispatched at 2:36 a.m. The aunt's house was only four or five blocks from the scene of the shooting, a distance that defendant could have traveled to be present at the time of the shooting. Moreover, two prosecution witnesses and defendant himself testified that defendant was in the van that was connected to the shooting just before the shooting occurred.

Defendant testified that he was in his mother's house when he heard a gunshot, and Leanna Morris testified in defendant's offer of proof that she saw defendant in her kitchen just after hearing the gunshot. Thus, Morris's testimony could have provided defendant with an alibi. However, defense counsel asserted at trial that he was not presenting an alibi defense, and argued instead that defendant could not have been the shooter because the evidence showed that the shooter had to be significantly taller than defendant. Also, there was testimony that other people were present near the scene of the shooting. Considering the testimony of other witnesses, and defendant's own testimony, which established his presence in the area near the time of the

¹ The proposed testimony of the two witnesses, Monica McBride and Leanna Morris, was presented in an offer of proof outside the jury's presence.

shooting, it was not objectively unreasonable for defense counsel to instead focus on the physical characteristics of the shooter and the presence of other individuals in the area to argue that defendant was not the shooter, rather than attempt to present a weaker alibi defense. Indeed, the other occupants of the van testified that seconds separated defendant's exit from the van and the gunshot. Although defendant's mother's house was nearby, he still would have had to cross the backyard, unlock the door, and enter the kitchen before the shot was fired in order for an alibi defense to be effective. Under the circumstances, the failure to file a notice of alibi did not deprive defendant of a substantial defense. That counsel's strategy did not work does not render its use ineffective assistance of counsel. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

Furthermore, because defense counsel's decision not to pursue an alibi defense was not unreasonable trial strategy, defense counsel was not ineffective for failing to request an instruction on that defense. *Mack, supra* at 130 (trial counsel is not ineffective for failing to make a futile motion). Also, the trial court had no duty to sua sponte instruct on that defense where there was no factual basis for it. Thus, the failure to instruct on that defense was not plain error. Further, the trial court instructed the jury that the prosecutor was required to prove each element of the charged offenses beyond a reasonable doubt, including defendant's identity as the perpetrator, so defendant's substantial rights were not affected. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000).

II. Prosecutorial Misconduct

Defendant argues that the prosecutor engaged in misconduct by eliciting evidence of his parole status. Although defendant objected to the relevancy of the challenged testimony at trial, he did not object to the prosecutor's conduct. Therefore, this issue is not preserved, *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), and we review the issue for plain error affecting defendant's substantial rights. *Knox, supra* at 508.

Defendant argues that the prosecutor engaged in misconduct when she elicited from Sergeant Angus that defendant was on parole.² Prosecutorial misconduct issues are decided on a case-by-case basis. We must examine the record and evaluate the conduct in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Further, otherwise improper prosecutorial conduct does not require reversal if it addresses issues raised by defense counsel. *Id.* at 64.

During his cross-examination of witness Jeremy Eddy, defense counsel asked Eddy what he read when he looked at defendant's paperwork. Eddy responded that he saw that defendant was on parole. Defense counsel further questioned Eddy regarding whether he actually saw paperwork stating that defendant was on parole. Later, in the prosecutor's examination of Sergeant Angus, the prosecutor asked if defendant's parolee status was in fact listed on a police report. The prosecutor's question was relevant to Eddy's credibility on this subject, which was

² Contrary to what defendant asserts, his parole violation status was not disclosed at trial.

an issue injected by defense counsel. “The credibility of a witness is always an appropriate subject for the jury’s consideration.” *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). The prosecutor simply asked whether it was possible that Eddy could have seen the information on a police report. Under the circumstances, the prosecutor’s limited question was not improper. *People v Jones*, 468 Mich 345; 353; 662 NW2d 376 (2003).

III. Witnesses’ Videotaped Statements

Defendant argues that the trial court abused its discretion in admitting the videotaped statements of three witnesses. He does not argue that the statements were not admissible under MRE 613 and MRE 801(d)(2), but rather argues that the evidence was unfairly prejudicial under MRE 403 because more of the recorded statements were shown to the jury than was necessary to impeach their trial testimony. However, defendant fails to identify the portions of each statement that he believes were extraneous or unnecessary, or explain how they prejudiced him. Thus, this issue may be considered abandoned. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Regardless, our review of the record discloses that the portions admitted at trial were relevant to the impeachment purposes for which the evidence was offered. In addition, the trial court instructed the jury several times on the limited use of the evidence for impeachment purposes only. Under the circumstances, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. MRE 403. The trial court did not abuse its discretion in allowing the evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

IV. Defendant’s Standard 4 Brief

Defendant raises two issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, neither of which has merit.

A. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to establish that he committed the charged crimes. In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crimes charged were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005), overruled on other grounds *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007). “[C]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.” *People v Lee*, 243 Mich App 163, 167-168; 622 NW2d 71 (2000). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

To establish second-degree murder, the prosecutor was required to prove “(1) a death, (2) the death was caused by an act of the defendant, (3) the defendant acted with malice, and (4) the defendant did not have a lawful justification or excuse.” *People v Smith*, 478 Mich 64, 70; 731 NW2d 411 (2007). “The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony.” *People v Avant*, 235 Mich App

499, 505; 597 NW2d 864 (1999). To establish felon in possession of a firearm, the prosecutor was required to prove that defendant was convicted of a specified felony that made him ineligible to possess a firearm at the time of the offense. MCL 750.224f(2). To establish CCW, the prosecutor was required to prove that defendant carried “a pistol concealed on or about his person . . . without a license to carry the pistol as provided by law.” MCL 750.227(2).

In this case, multiple witnesses testified that defendant was in the van until shortly before the gunshot was fired, and that he was the only person to exit the van. Another witness testified that the person who exited the van shot the victim. Although this witness did not see a gun, he saw the shooter point something at the victim, which was followed by a bang and a flash, resulting in the victim being shot. Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable the jury to find beyond a reasonable doubt that defendant was the person who exited the van, and that he possessed a firearm that he used to shoot the victim. Further, defendant stipulated that he was ineligible to possess a firearm.

Defendant asserts that only by impermissibly stacking inferences can one speculate that he was the shooter. However, multiple inferences from relevant evidence and inferences based on inferences are permissible. *Hardiman, supra* at 428. Furthermore, the inferences here are reasonable, not merely speculative. Accordingly, the evidence was sufficient evidence to support each of defendant’s convictions.

B. Autopsy Photographs

Defendant lastly argues that the trial court erred in admitting certain autopsy photographs. This Court reviews a trial court’s decision to admit photographs for an abuse of discretion. *People v Cervi*, 270 Mich App 603, 625; 717 NW2d 356 (2006). Demonstrative evidence is admissible if it is relevant and its probative value is not substantially outweighed by its prejudicial effect. *People v Unger (On Remand)*, 278 Mich App 210, 247; 749 NW2d 272 (2008).

Photographs are admissible if substantially necessary or instructive to show material facts or conditions. If photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they vividly portray the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. [*People v Hoffman*, 205 Mich App 1, 18; 518 NW2d 817 (1994) (citations omitted).]

Autopsy photographs are relevant where they are instructive in depicting the nature and extent of the victim’s injuries. *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Also, photographs may be admitted as evidence to corroborate a witness’s testimony. *Unger, supra* at 257.

Defendant argues that the photographs were irrelevant because he did not contest the cause of death or that the victim was killed in a brutal fashion. However, defendant was charged with first-degree premeditated murder and the jury was instructed on first and second-degree murder. The prosecution is required to prove each element of a charged offense regardless of whether the defendant specifically disputes or offers to stipulate any of the elements. *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). Therefore, while defendant did not

contest the victim's cause of death, the prosecution was not relieved of its duty to prove all of the elements of first-degree murder, including intent. *People v Mesik (On Reconsideration)*, ___ Mich App ___; ___ NW2d ___ (2009), slip op p 5. The photographs were helpful to meet this burden because they depicted the nature and extent of the injuries. Although the medical examiner testified to the injuries, the jury is not required to depend solely on the testimony of experts, but is entitled to view the severity and vastness of the injuries for itself. *People v Mills*, 450 Mich 61, 72-73; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. MRE 403. The trial court did not abuse its discretion in admitting them.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ E. Thomas Fitzgerald